86 - 1154

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1986

LETTERMAN BROTHERS ENERGY PROGRAMS 1980-2, et. al.,

Petitioners,

v.

BANCTEXAS DALLAS, N.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WINSTEAD, MCGUIRE, SECHREST & MINICK
910 Travis Street
Suite 1410
Houston, Texas 77002-5895
(713) 655-0392

W. TED MINICK*
IVAN M. SCOTT, JR.

Attorneys for Respondent BancTexas Dallas, N.A.

**Counsel of Record*

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75208 — (214) 748-6022

QUESTIONS PRESENTED

Whether a plaintiff who relied on the out-of-pocket measure of damages in the trial court but failed to introduce any evidence from which damages could be determined under that measure should be allowed to recover under the recission measure of damages.

PARTIES TO THE PROCEEDING

PETITIONERS:

Letterman Brothers Energy Program 1980-2, a California limited partnership.

Letterman Brothers Energy Program 1980-5, a California limited partnership.

Letterman Brothers Energy Program 1980-6, a California limited partnership.

Letterman Brothers Energy Program 1980-10, a California limited partnership.

Letterman Brothers Energy Program 1981-1, a California limited partnership.

Letterman Brothers Energy Program 1981-3, a California limited partnership.

Letterman Brothers Energy Program 1981-5, a California limited partnership.

Letterman Brothers Energy Program 1981-6, a California limited partnership.

Letterman Brothers Energy Program 1981-7, a California limited partnership.

Letterman Brothers Energy Program 1981-8, a California limited partnership.

Letterman Brothers Energy Program 1981-9, a California limited partnership.

RESPONDENT:

BancTexas Dallas, N.A., formerly known as National Bank of Commerce of Dallas, Texas, a National Banking Association

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities ..... iv, v

Statutory Provisions Involved vi

Statement of the Case 1

Reasons for Denying the Writ 5-14

1. There are no Special or Important Reasons Calling for an Exercise of this Court's Power of Supervision 5

2. Petitioners Could Have Presented Evidence on Damages Under the Out-of-Pocket Measure but Failed to do so. 5-9

2. There is no Conflict Among the Circuits. 10-14

Conclusion 14-15

APPENDIX

Excerpt of the Transcript of the Trial A-1

Table of Authorities

Cases Page

Chasins v. Smith, Barney & Co., Inc., 438 F.2d 1167 (2d Cir. 1970) 6, 10

Esplin v. Hirschi, 402 F.2d 94, 104 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969) 11

Garnatz v. Stifel, Nicolaus & Co., Inc., 559 F.2d 1357 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978) 11

Harris v. American Investment Co., 523 F.2d 220, 226 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976) 14

Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp 112, 129 (S.D.N.Y. 1974), modified, 540 F.2d 27 (2d Cir. 1976) 13

Huddleston v. Herman & MacLean, 640 F.2d 534, 554 (5th Cir. 1981), aff'd in part and rev'd and remanded on other grounds, 459 U.S. 375, on remand, 705 F.2d 775 (5th Cir. 1983) 12

In re Letterman Brothers Energy Securities Litigation, 799 F.2d 967, 972 (5th Cir. 1986) ... 7, 10,

Randall v. Loftsgaarden, 478 U.S. ....., 106 S.Ct. 3143, 3152 (1986) 6-7

Rondea v. Mosinee Paper Corp., 422 U.S. 49, 64-65 (1975) 6

Statutes

§12 of the 1933 Act., 15 U.S.C. §771 12

15 U.S.C. §78bb(a) 14

Sup. Ct. R. 17.1, 28 U.S.C. 5

Table of Authorities - (Continued)

Other Authorities Page

Note, The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities, 26 Stan. L. Rev. 371 (1974) 11

Thompson, The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages, 37 Vand. L. Rev. 349 (1984) 9

STATURY PROVISIONS INVOLVED

BancTexas disagrees that the statutory provisions set forth by Petitioners are involved in this Petition. The only statutory provision involved is the portion of section 28(a) of the Securities Exchange Act of 1934 which deals with damages as follows:

> [N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

15 U.S.C. §78bb(a).

In The

Supreme Court of the United States

OCTOBER TERM, 1986

LETTERMAN BROTHERS ENERGY PROGRAMS 1980-2, et. al.,

Petitioners,

v.

BANCTEXAS DALLAS, N.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Much of Petitioners' Statement of the Case is pure argument unrelated to the issue of law presented. Moreover, Petitioners misstate and mischaracterize the evidence in a blatant attempt to bias the Court.

The sole question presented by Petitioners involves the applicable meaure of damages under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Contrary to the implications of Petitioners, there has been no finding of fraud under such act. Rather, at the

conclusion of the Petitioners' evidence, the trial court granted BancTexas' Motion for Directed Verdict because Petitioners had failed to prove damages. Significantly, at trial, Petitioners did not seek the application of any measure of damages other than the "out-of-pocket" measure. In fact, Petitioners argued that their proof qualified under that measure.[1]

Petitioners seek to make it appear that the Letterman Brothers, who syndicated the eleven petitioning partnerships, were inexperienced in oil and gas and relied entirely upon BancTexas. This is inaccurate. Bryce and Scott Letterman were stockbrokers who commenced oil and gas activities in 1978. They thoroughly checked out the operators of their oil and gas programs prior to deciding to use them.

Before BancTexas had ever heard of Letterman Brothers, Bryce Letterman had met with Barry Battelstein; had visited Wells-Battelstein's offices in Houston; had met all their key people; had visited Wells-Battelstein's offices, machine shops, truck yards, leases in Kansas; had talked to Wells-Battelstein's suppliers, contractors, and geologists, had requested and received a financial statement; and had requested and received a drilling history.

Letterman had contacted the Bank in Ohio that had financed some of his prior programs about financing investments with Wells-Battelstein and was told that they would not finance these programs. He then went to BancTexas. On May 1, 1980, Letterman met with Terry Stuart of BancTexas. Bryce Letterman testified that Stuart told him (1) Wells-Battelstein was one of the Bank's most successful customers, (2) he thought Wells-Battelstein was

[1] Only post trial have Petitioners sought application of some other measure. In summary, Petitioners are not asking this Court to correct or modify the application of law, but to correct Petitioners' failure of proof.

a very high integrity company, (3) the bank thought a lot of them as a customer, and (4) they were very creditworthy. Stuart also told him Wells-Battelstein had a $1,000,000 line of credit that would soon be increased to $2,500,000. These statements form the basis of Petitioners' claims that BancTexas defrauded the partnerships (formed over the next eighteen months) to invest in the Kansas mineral leases.

Before entering into any of the ventures, Letterman hired independent petroleum geologists to review the geological information provided by Wells-Battelstein. This geologist was retained by each partnership to determine whether it should invest in the prospect. Letterman had attorneys investigate Wells-Battelstein to insure that the information contained in the offering circular, which would be presented to the State of California and to potential investors, was accurate.

In their attempt to gloss over their failure of proof, Petitioners ignore many relevant facts in their arguments that the oil and gas leases purchased by them were worthless. Petitioners ignore the fact that actual reserves were far less than hoped for. Petitioners ignore the fact that oil and gas prices, rather than going up to the anticipated $60.00 per barrel, went down. Petitioners also characterize their position as being "locked into contractual liabilities under the operating agreements" when, in fact, Petitioners had the right and ability to remove Wells-Battelstein as the operator on the leases. Most importantly, Petitioners ignore the fact that some of the programs actually generated profits.

The truly relevant facts in this case can be briefly summarized. Letterman Brothers became interested in form-

ing oil and gas development partnerships involving Wells-Battelstein. Wells-Battelstein was a customer of BancTexas. Bryce Letterman came to BancTexas seeking loans to enable him to put together the programs he desired to promote and sell after other banks had decided not to finance these programs. Letterman Brothers were paid substantial fees by the programs. All these programs were very highly leveraged. Interest rates went up considerably, very little oil and gas was found, and oil prices dropped. As a result, Petitioners were unable to pay their debt to BancTexas. The investors looked to Letterman Brothers and several suits were filed against them. Wells-Battelstein went bankrupt. By agreeing to waive the statute of limitations, Letterman Brothers were able to get the investors to halt prosecution of their suits while they pursued this suit on behalf of all investors against BancTexas. Only then did the Energy Programs institute suit against BancTexas.

BancTexas asserted numerous grounds in support of its Motion for Directed Verdict on the 10b-5 claim. As stated by the District Court, the measure of damages was "just one of the problems that we have on the 10b-5 claim." A-10 Appendix. However, the District Court did not reach the other issues after concluding that there was no evidence on the proper measure of damages. Before this Court, Petitioners omit the first two pages of the Transcript concerning the measure of damages in which Petitioners' counsel agreed that the out-of-pocket measure is appropriate. Petitioners also took the liberty of presenting the end of the argument as the first two pages in their Appendix D. A corrected excerpt of the Transcript beginning on page 2038 in the order that it actually occurred is included as Appendix A.

REASONS FOR DENYING THE WRIT

1. THERE ARE NO SPECIAL OR IMPORTANT REASONS CALLING FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Certiorari lies only where there are special and important reasons. Sup. Ct. R. 17.1, 28 U.S.C. There are none in this case. There is no conflict between decisions of the courts of appeals on the proper measure of damages applicable to this case. The Fifth Circuit has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. The Fifth Circuit did not decide an important question of federal law which has not been, but should be, settled by this Court. Finally, the Fifth Circuit did not decide a federal question in a way in conflict with applicable decisions of this Court. *Id.*

2. PETITIONERS COULD HAVE PRESENTED EVIDENCE ON DAMAGES UNDER THE OUT-OF-POCKET MEASURE BUT FAILED TO DO SO.

Petitioners elected to rely upon the out-of-pocket measure of damages in the district court.[2] However, Petitioners failed to present evidence of the fair market value of the alleged securities on any relevant date.[3] This is true whether the traditional out-of-pocket measure is used or

---

[2] Appendix A-1. Mr. Wineberg: "Yes, Your Honor; and what we were submitting is not an argument over the fact that we have the out of pocket damages as being our test."

[3] District Court Opinion, Petitioner's Appendix B-15.

the modified out-of-pocket measure as applied in *Chasins v. Smith Barney & Co., Inc.*, 438 F.2d 1167 (2d Cir. 1970) is used.[4] Petitioners had an adequate opportunity to present evidence at trial on the proper measure of damages. District Court Opinion, Petitioner's Appendix B-16. Petitioner's failure to present evidence on the proper measure of damages did not result from a technical error or any conduct of BancTexas but rather from Petitioners' own decision. *Id.* Finding themselves precluded from recovery because of their failure to prevent evidence on damages, Petitioners now seek to get this Court to sanction utilization of the rescission measure of damages in the case at bar if not all cases. The thrust of Petitioners' argument is that the "securities laws . . . must be construed flexibly to effectuate their remedial purposes . . . and the courts must adjust the remedies so as to grant the necessary relief where federally secured rights are invaded."[5] This invitation should be declined. The fact that a party is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing the usual prerequisites to recovery. *Rondea v. Mosinee Paper Corp.*, 422 U.S. 49, 64-65 (1975).

Relying on this Court's recent statement that "[t]he issue whether and under what circumstances . . . a rescissionary measure of damages is available under §10(b) is an unsettled one," Petitioners argue that this case presents an excellent opportunity to address that issue. *See Randall*

---

[4] *See Id.* and discussion of *Chasins, infra.*

[5] Petition at 14. It should be noted that there are serious questions as to both whether any federally secured rights were involved or invaded.

v. Loftsgaarden, 478 U.S. ....., 106 S.Ct. 3143, 3152 (1986)). There is nothing unusual about this case which warrants a deviation from the generally accepted out-of-pocket measure which was recognized in *Randall v. Loftsgaarden. Id.* at 3153.

Petitioners inaccuratley argue that utilization of the out-of-pocket measure of damages leaves them with no remedy. BancTexas' Motion for Directed Verdict was granted because Petitioners merely failed to introduce any evidence from which such damages could be determined. This was either an oversight or a consciuos decision on Petitioners' part. It does not call for an expansion or liberalization of the appropriate measure of damages to be applied in Rule 10b-5 cases.

The Fifth Circuit, recognizing that a rescissional measure of damages is applicable in some cases, properly held that BancTexas was not within the category of parties against whom rescissional damages may be awarded. *In re Letterman Brothers Energy Securities Litigation,* 799 F.2d 967, 972 (5th Cir. 1986). As recognized by the Fifth Circuit, to hold BancTexas liable under a rescissional measure of damages would place on it the entire burden of any decline in value of the security even though only a portion of the decline may have been caused by the conduct complained of. *Id.* at 972-73.

Petitioners misquote the Fifth Circuit by saying that the decision below recognized that the evil was the inducement, not the price. In stating that Petitioners might have pursued a claim for consequential damages, but failed to present such evidence, the Fifth Circuit actually said that

"any misrepresentation BancTexas might have made went not to the value of the leases and equipment acquired but to the decision to choose Wells-Battelstein as the operator." *Id.* at 973 n. 5. Thus, the Court was not saying that BancTexas induced the investments. It should also be noted that Petitioners could have replaced Wells-Battelstein as the operator. However, they would have suffered the same fate because the leases simply proved to have inadequate reserves to be profitable in a period of high interest rates with low oil prices.[6]

Petitioners' argument that if what they received must be valued at the date of the contract then it must be concluded that they received exactly what they paid for and thus suffered no damages under the out-of-pocket measure is simply wrong. Petitioners were not precluded from recovering because no damages *could* be shown under the out-of-pocket measure but rather because Petitioners failed to present any evidence thereon. Petitioners did receive tangible property and rights which had value. Petitioners merely failed to present evidence of the value of what they received absent Wells-Battelstein as the operator and choose to seek recovery of all their losses including those caused by the economy and mother nature. Petitioners cite no authority which would sanction such a result but rather ask this Court to create such authority and allow all 10b-5 claimants to elect this measure of damages.

Petitioners cite Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Dam-*

---

[6] Mr. Wineberg himself argued that the leases would have been profitable had oil prices gone up to the projected $60 per barrel price. Appendix A-7.

ages, 37 Vand. L. Rev. 349, 351 (1984) as authority that "recent decisions evidence a trend toward the use of the rescissionary measure." Pet. at. 15. Professor Thompson actually said

> Recent decisions in securities cases evidence a trend toward a result that combines elements of both out of pocket and rescission theories. Courts increasingly are awarding . . . the difference between the value of what [plaintiff] gave up . . . and the value of what [plaintiff] received, measured at a reasonable time after discovery of the fraud.

Id. This is actually the modified out-of-pocket measure of damages and Petitioners failed to offer any evidence on the value of what they received "at any relevant date." District Court Opinion, Petitioners' Appendix B-15.

Professor Thompson's article on the Measure of Recovery under Rule 10b-5 actually deals mostly with the difference between tort theories of recovery, out-of-pocket, and unjust enrichment theories. Unjust enrichment in securities law is often called disgorgement. However, reviewing the article and trying to apply each of the measures discussed illuminates the fact that Petitioners cannot recover under any measure but rescission because there is no evidence from which damages can be calculated. Petitioners cannot recover under the out-of-pocket measure or the modified out-of-pocket measure because there is no evidence of the value of the interests purchased on any relevant date. Petitioners cannot recover under an unjust enrichment or disgorgement measure because there is no evidence of any profits to BancTexas. In fact, BancTexas lost millions of dollars.

3. THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners argue that any time the alleged misrepresentation goes to the decision to invest rather than the price, the rescissional measure of damages should be applicable. Petitioners urge this Court to extend the applicability of the rescissional measure to all cases.

There is no conflict between the decision below and the cases relied upon by Petitioners. The Fifth Circuit expressly recognized that the rescission measure could be applied where there is privity or where the defendant owes some fiduciary duty such as that owed by a broker to his customer.[7] *In re Letterman Bros.*, 799 F.2d 967, 972 (5th Cir. 1986). These conditions exist in the cases relied upon by Petitioners. Further, the cases relied upon by Petitioners do not apply the rescission measure but rather apply the modified out-of-pocket measure.

Petitioners rely principally upon *Chasins v. Smith Barney & Co.,, Inc.*, 438 F.2d 1167 (2d Cir. 1970) where the defendant was a broker. *Chasins* did not apply a rescission measure of damages as advocated by Petitioners but rather used the modified out-of-pocket measure. Under the *Chasins* measure, a buyer recovers the fair value of the consideration paid less the fair value of the security *within a reasonable time* after the buyer discovered or should have discovered the fraud. In *Chasins,* value was determined by the price received when the Plaintiff sold the securities before learning of the manipulative conduct.

[7] Petitioners attempt to confuse the issue by questioning when a bank might be acting in a situation closely analogous to that of a broker. In fact, the district court held that there was no fiduciary relationship between Petitioners and BancTexas and this was affirmed by the Fifth Circuit. *In re Letterman Bros.*, 799 F.2d at 975.

Id. at 1173. Petitioners, however, have failed to provide sufficient evidence of fair market value *on any relevant date.* District Court Opinion, Petitioners Appendix B-15.

Garnatz v. Stifel, Nicolaus & Co., Inc., 559 F.2d 1357 (8th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978) also does not conflict with the decision in the case at bar. The defendant in *Garnatz* was a broker. The Fifth Circuit expressly recognized that the rescission measure could be applied in such a case. Like *Chasins,* the Court in *Garnatz* also recognized that the plaintiff must bear any decline in value after actual or constructive knowledge of the alleged conduct and applied the modified out-of-pocket measure. *Garnatz,* 559 F.2d at 1361. There also was evidence of such value, which is absent in the case at bar.

In *Esplin v. Hirschi,* 402 F.2d 94, 104 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969) there was privity and the court awarded recovery under the modified out-of-pocket measure. There was evidence and a jury finding of this value. *Id.*

Contrary to the Petitioners' position that only the Fifth Circuit requires privity or a fiduciary relationship before applying the rescissional measure of damages, "[e]very case awarding defrauded buyers a rescission measure of damages displays a distinctive element . . . [they] are accented either by privity or by the special duty owed by brokers to their customers." Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities,* 26 Stan. L. Rev. 371, 376-77 (1974). Nor are these requirements irrational and inappropriate as suggested by Petitioners. If the relationship limits are broadly expanded as requested by Petitioners, rescissionary dam-

ages "should be deemed inappropriate" unless "a workable means of distinguishing risks and losses is developed and applied. . . ." *Id.* at 377. Petitioners wholly failed to provide any evidence to distinguish the risks and losses hoping to recover every dollar invested even though much, if not all, of their losses were due to economic and natural forces which risks they assumed. Further, the equitable principals underlying utilization of the rescission or unjust enrichment measures should not be applied where the defendant was not unjustly enriched nor more culpable than merely negligent. *Id.* at 385. While Petitioners try mightily to make the Court feel that BancTexas is guilty of fraudulent conduct, that issue never reached the jury.

There are patent difficulties inherent in the application of the rescissional measure to transactions between purchasers and parties who were not sellers. *Huddleston v. Herman & MacLean,* 640 F.2d 534, 554 (5th Cir. 1981), *aff'd in part and rev'd and remanded on other grounds,* 459 U.S. 375, *on remand,* 705 F.2d 775 (5th Cir. 1983). Even under §12 of the 1933 Act, 15 U.S.C. §771, which expressly provides a rescissional measure of damages, such recovery is limited to situations where the plaintiff purchased from the defendant. *See Id.* A defendant who was not the seller is unable to return the price paid because he did not receive it and cannot rescind a transaction to which he was not a party. *Huddletson, supra* at 555. More importantly, application of a rescissional measure in such a case places upon the defendant the burden of any decline in value including those resulting from factors unrelated to the alleged wrong. *Id.* Under these circumstances, a rescissional measure is unjust because it compensates a plaintiff for the

risks which he assumed by entering the market. *Id.* These losses bear no relationship to the benefits derived by the defendant nor to the blameworthiness of the alleged conduct. *Id.*

Petitioners ask this Court to adopt a theory expressly rejected by *Huddleston* that "but for" the alleged actions of BancTexas they would not have purchased and hence would have suffered no losses. *Id.* In this case, the proper measure of damages to reflect the loss proximately caused by the alleged misconduct of BancTexas is the out-of-pocket measure. This would merely require valuing the assets and rights purchased with an operator other than Wells-Battelstein. If this in fact is zero as Petitioners state, then Petitioners have established that their losses are due to economic changes and the fact that the oil reserves proved to be less than hoped for, all of which are risks inherent in speculating in the oil and gas business.

Petitioners cite *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath,* 378 F. Supp. 112, 129 (S.D.N.Y. 1974), *modified,* 540 F.2d 27 (2d Cir. 1976) for the proposition that the securities can be valued as of the time of trial. The Court in *Herzfeld* did not make such a holding. Rather, the court, on its own motion, reduced the damages by the value of the securities. *Id.* Defendant had attacked only the award of interest and thus no issue was presented or discussed as to the proper date on which value should be fixed. In this same discussion, Petitioners twist the decision in the case at bar by saying that the Fifth Circuit has precluded them from recovering because there is no privity or fiduciary duty. Petitioners' inability to recover results

from their own failure to introduce sufficient evidence of the value of the assets and rights received as of any relevant date.

Harris v. American Investment Co., 523 F.2d 220, 226 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) is a summary judgment case and does not address the issue of when the recissionary measure of damages is applicable. In fact, *Harris* merely discusses dates that *might* be used for determining value under the out-of-pocket measure and concludes that it *may* be proper to determine value as of the date the public discovers the fraud because only then would the market price of the stock reflect the true value absent the misrepresentations. *Id.* at 226. This is merely looking at the market price of a stock on a subsequent date as evidence of its true value on the date the plaintiff purchased.

Acceptance of Petitioners' arguments would extend the rescissional measure of damages to all cases. It is difficult to imagine a case when a Plaintiff could not argue that but for the fraudulent conduct he would not have purchased. Such an expansion is unwarranted.

CONCLUSION

The Securities Exchange Act of 1934 provides that "no person . . . shall recover . . . a total amount in excess of his actual damages *on account of the act complained of.*" 15 U.S.C. §78bb(a) (emphasis added). Petitioners ask this Court to ignore this requirement of causation and establish a standard which will allow recovery from a non seller of all amounts spent. Petitioners ask this Court to estab-

lish this liberal standard so that they may avoid the effect of their own failure to offer evidence on the value of the property purchased by them as of any relevant date so that damages could be determined under the out-of-pocket measure upon which they relied. There are no special or important reasons calling for review on writ of certiorari.

Respectfully submitted,

WINSTEAD, MCGUIRE,
SECHREST & MINICK
910 Travis Street
Suite 1410
Houston, Texas 77002-5895
(713) 655-0392

W. TED MINICK
IVAN M. SCOTT, JR.

Attorneys for Respondent
BancTexas Dallas, N.A.

Dated: February 11, 1987

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of February, 1987, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to William A. Wineberg, Broad, Schulz, Larson & Wineberg, One California Street, 14th Floor, San Francisco, California 94111, counsel for Petitioners; J. Albert Kroemer, Esq., Matthews and Kroemer, One Main Place, Suite 2000, Dallas, Texas 75202-3977; Richard A. Sayles, Esq., Carrington, Coleman, Sloman & Blumenthal, 110 East Davis Street, McKinney, Texas 75069. I further certify that all parties required to be served have been served.

W. TED MINICK
IVAN M. SCOTT, JR.
WINSTEAD, MCGUIRE,
SECHREST & MINICK
910 Travis Street
Suite 1410
Houston, Texas 77002-5895
(713) 655-0392
Counsel for Respondent

BEST AVAI

ABLE COPY

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

In Re:	(	M.D.L. No. 560
	(	
LETTERMAN BROTHERS	(	CA3-82-1032-D
ENERGY PROGRAM	(	CA3-83-1051-D
SECURITIES LITIGATION	(	CA3-83-2098-D

Dallas, Texas
March 29, 1984
9:00 a.m.

Excerpt of the Transcript of the Trial
Before The Honorable Robert M. Hill and a Jury
(page 2038 line 5 through page 2048 line 18)

THE COURT: Okay. Mr. Wineberg, I think the thing we need to address first is the measure of damages. That has been raised as a most serious ground, I would assume, and that would apply to your 10b-5 claims or your Act claims, and also it would probably apply to the Texas Security Act, because it's a mirror image of the 12 b, Section 12 b, rulings, the 10b-5.

He has got this — I assume you read the Huddleston case. The Fifth Circuit says — The Huddleston case says that the measure of damages in a 10b-5 case is the, quote, out of pocket measure, end quote, and that't the difference between the price paid and the real value of the security. In other words, the fair market value and the misrepresentations and the critical language, I guess, is, quote, at the time of the initial purchase by the defrauded buyer, end quote.

MR. WINEBERG: Yes, Your Honor; and what we

were submitting is not an argument over the fact that we have out the pocket damages as being our test.

THE COURT: Does your evidence —

MR. WINEBERG: The question is how we measure it, as was recognized by the Court in the Austin Lovegar decision, which is Eighth Circuit. But one of the leading cases in this area says the measure is not a talisman but a function of the court to fashion the remedy best suited to the harm. You have to look at what type of securities are being purchased.

THE COURT: Well, these are oil and gas.

MR. WINEBERG: These are oil and gas interests, which is very different than if you were buying General Motor stock on the New York Stock Exchange.

THE COURT: Let me stop you right there. The Fifth Circuit in Huddleston footnotes cites some cases that support their definition of out of pocket expenses, and one of those cases, the North Texas — North, dash, Texas — Agency versus Jones, which is an oil and gas undivided interest purchase in an oil and gas investment.

I know about the case. I tried it ten years ago.

MR. WINEBERG: I didn't get a chance to read it last night, Your Honor.

THE COURT: Well, it's an oil and gas case where plaintiff purchased an undivided interest in some oil and gas prospects, and the measure of damages in the case was that expressed in the Huddleston case, and they have cited that as the support of that statement.

In addition, in this last case — there is Judge Higgen-

botham's case in 1984, February 27 — Siebel, S-i-e-b-e-l, versus Scott, and he reaffirms that where he says where all of the elements of a Section b violation are proven, quote, the proper measure of damages to reflect the loss proximately caused by the defendants' defeat is the out of pocket rule.

That rule is the traditional measure of damages in a Rule 10b-5 action, and got the — He was quoting Huddleston, and then he goes on to say, "It is the out of pocket rule allows damages, quote, the difference between the price received on the value of the securities at the time of the fraudulent transaction, end quote, citing Alley, A-l-l-e-y, versus Miramom, M-i-r-a-m-o-m, another Fifth Circuit case, 1980.

So, it's pretty well established in this Circuit — I'm not saying what the Eighth Circuit would do, but in this Circuit this is the test.

MR. WINEBERG: And we feel and would be happy to go to the jury on that question based on the truth that we have.

THE COURT: What evidence do we have, then, as to the value as represented and the value had the representations not been made?

MR. WINEBERG: There is evidence in the record. They have the evidence of what was paid, what was paid on each of the programs. We also have the evidence in the record in which a juror can find from substantial evidence that these were worthless properties that they purchased. These properties were the sort where you were buying not only an interest; you were buying liability. You entered into an agreement in which you had to pay certain expenses.

THE COURT: What evidence do we have that on the date they acquired their investments and made their investments with Wells-Battelstein that those properties were valueless?

MR. WINEBERG: What we had — We weren't buying the properties, Your Honor. We were buying an oil and gas — a fraction of an oil and gas drilling lease that was going to be developed.

THE COURT: Now what evidence do we have that as of that date that they were valueless, that they have had no value? What evidence do we have of a their value and the misrepresentations, alleged misrepresentations.

MR. WINEBERG: What you have to do, Your Honor — And as the Court said in Falstaff Brewing Company, you have to use the best evidence you have in order to determine what that value was, and the best evidence —

THE COURT: Now that's an anti-trust suit?

MR. WINEBERG: I believe it was, Your Honor. It also applies in securities cases.

THE COURT: Well, now Huddleston applies to securities.

MR. WINEBERG: But the question is the general principal, Your Honor, what the amount, exact anticipated amount, of the damages is difficult.

THE COURT: Why is it difficult?

MR. WINEBERG: Because they were worthless, Your Honor. You can's —

THE COURT: Who said they were worthless?

MR. WINEBERG: The facts prove they were worthless. They were bought and sold because of misrepresenta-

tions and omissions.

THE COURT: Well, now how do we know that they were worthless?

MR. WINEBERG: Because as the evidence shows, as soon as the price of the package was established, they were losers, and it resulted in liability to the partnership.

THE COURT: How do we have they were losing? We have to look at subsequent events and transactions.

MR. WINEBERG: You have to do that in order to prove they were worthless at the time.

THE COURT: What did we look at to prove they were worthless?

MR. WINEBERG: You look at the amount paid, you look at the expenses that were charged, you look at the cash flow, you look at the liability that is assumed for operating expenses, and you find out that — as Mr. Letterman testified — they are incurring liabilities because the costs are exceeding the income, and the purchaser is constantly losing money because of the liability.

THE COURT: Well, it's just a bad investment. That's what you are saying is that it was a bad inverstment.

MR. WINEBERG: It was a bad investment, but you can't get out of the fact that it was a fraudulent investment. You can't forget the fact that there were misrepresentations.

THE COURT: All right. Now what value did the property have on the date it was acquired?

MR. WINEBERG: I submit —

THE COURT: What real value can it have?

MR. WINEBERG: I submit it had none, Your Honor, and the record is clear that at the price — in the context of these securities that was sold, you have property that has to be developed. There has been testimony that these can be economical, and Mr. Terry Stewart testified to it, and Mr. MacFarlane testified to it, and they both said it on the stand.

If you have a very small operation where you can drill the well for five thousand dollars and have a local person go out and keep you on your low operating expenses, these leases at one or two barrels a day have value. We asked them at the stand if they had any value, other than that type of operation with a turnkey drilling price of twenty-five thousand dollars a well, and with a big company with per well charges, a Wells-Battelstein, was charging expenses, and Mr. MacFarlane testified, no. In that case he said it depended on the operating costs.

Mr. Stewart talked about them being marginal properties at best. We have evidence that there was a ten thousand dollar profit built into the security on the turnkey drilling that the bank knew about in advance. There was also a profit built into the drilling company which was affiliated with Wells-Battelstein that was built into it.

THE COURT: What are the properties worth today?

MR. WINEBERG: I would like to get them off our back, Your Honor, because they are costing us money. We are incurring — The Trustee claims that we owe them money.

THE COURT: What evidence do we have as to the value of those properties?

MR. WINEBERG: Scott testified that they were value-

less. Mr. Letterman got up and testified that they were valueless, and that the Trustee was billing them, and they had a negative liability, that they had to pay forty-five thousand dollars for last year.

THE COURT: What would be the value on equipment on the leases?

MR. WINEBERG: Negligible, Your Honor.

THE COURT: How do we know that? What effect did the price of oil have on this operation? What effect do you think the price of oil going down had on this operation?

MR. WINEBERG: I don't think it had any. It couldn't have made it, even at thirty-five dollars or thirty-eight dollars a barrel. We would have the exact same result at that price. If oil had gone to fifty or sixty dollars, yes.

We have a situation — I did submit and was ruled on, and they were not admitted. I submitted the bills that the Trustee has submitted for operating expenses, which admittedly we contest. They show over a million dollars in expenses that the Trustees has submitted to us, which are bills that the Trustee has submitted to Letterman Brothers on these programs.

THE COURT: Do you want to make any comment? Let me ask you, Mr. Kroemer. You are directly involved in this too. Do you want to make any comment in addition?

MR. KROEMER: It seems to me, Judge, that it's clear from the entire testimony of the trial that but for the misrepresentations by Wells-Battelstein that the properties would have had no value, because they couldn't have sold them without those misrepresentations.

THE COURT: What value did they have?

MR. KROEMER: In the hands of Wells-Battelstein, I think, based on the testimony, in the hands of Wells-Battelstein they didn't have any value, because Wells-Battelstein could not do what they have represented they can do. All they could do is drill holes and create liabilities, and so I think in the hands of Wells-Battelstein these properties did not have any economic value, and the subsequent events have proven that, Judge.

And so I agree with Mr. Wineberg. I think the jury can look at that and reach a reasonable determination. I don't think it requires an expert to come in here and tell us in his opinion, as to these misrepresentations, that those properties could have done X, because you would have to look at it the way it was.

THE COURT: Well, can't an expert look at an oil and gas property and give us an opinion as to the value that properties on a given date?

MR. WINEBERG: I think we have learned in this case that's very chancy, Your Honor. It depends upon operating expenses, and it depends upon a lot of things.

There is one other test I wold like to mention to Your Honor, which is something that is directly in the record, and that is that Mr. Letterman was asked the question in the examination how much would he have paid for these properties if he had had a full disclosure, but for the disclosures that were made to him, if he had known, if they had told him that there were doing a ten thousand dollar profit on turnkey drilling, if they had told him this the operating expenses would run sixty-five to a hundred percent on the property, and his answer was, "I wouldn't have paid a penny."

And that's the context that you will also have to consider as to what the damages were. It's the whole package that must be considered on the investment, Your Honor, rather than just the lease.

THE COURT: Well, reading from Huddleston, the court says neither the application or the out of pocket measure too complex to be applied in this case. The use of the out of pocket rule will require that a true or real value, i.e., the value the securities would have had absent the misrepresentations, be established for each date on which members of the class purchased during the ninety day class period.

"Once those values are obtained, possibly with the help of expert witnesses or a special master, then the determination of each individual plaintiff's recovery becomes a simple matter of subtraction of the true value of the security on the date of the plaintiff's purchase from the purchase price paid by the plaintiff on that date.

"The issue of damages is thus an individual matter to be determined separately from each member of the plaintiff class."

Now in this case we don't have — Well, in a sense we do have a class. We have a class of programs, and each program would have to establish the true value of that property on the date it acquired the property. There just isn't any evidence, none. It doesn't exist in this case.

MR. WINEBERG: Your Honor, I would submit the language as to the misrepresentation would be the value. Do we have evidence that absent of the misrepresentation there would be no value.

THE COURT: No; we don't have evidence of that.

Now they may have mismanaged the property. They may have spent too much money. I don't know whether they did or they didn't. There is no proof. They spent X amount of dollars, but we don't know whether that's reasonable or unreasonable. We have no way of knowing. It might have taken every dime they spent to develop these properties. It was just a bad deal. They couldn't be developed.

But that's the kind of evidence that you need, somebody to come in here as an expert and give us an opinion. I don't think there is any evidence on the measure of damages. That's just one of the problems that we have on the 10b-5 claim.

I am not excluding the other issues, but that is the big issue that we don't have any evidence on. I have to grant their Motion on 10b-5.